(15)

Supreme Court, U.S.
FILED
MAR 6 - 2006
OFFICE OF THE CLERK

No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
CAROLYN M. SNURKOWSKI*
ASSISTANT DEPUTY
ATTORNEY GENERAL
OFFICE OF THE ATTORNEY
GENERAL
The Capitol
Tallahassee, FL 32399
(850) 414-3300

D. TODD DOSS*
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

* Counsel of Record

March 6, 2006

PETITION FOR CERTIORARI FILED JANUARY 24, 2006
CERTIORARI GRANTED JANUARY 25, 2006

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United States Court of Appeals
11th Circuit-Atlanta
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

06-10621-P

Clarence E. Hill v. James V. Crosby, Jr.

Entry Date	Docket Entry
01/23/08	Application for a Stay of Execution and For Expedited Appeal:
01/23/06	Response to Application for a Stay of Execution and for Expedited Appeal:
01/24/06	PUBLISHED ORDER: Appellant Clarence Edward Hill has been convicted of capital murder in Florida & sentenced to death. . . . [W]e DENY appellant's application for a stay of his execution pending appeal. JLE/GBT/WHP(j) (SEE FILE FOR COMPLETE TEXT) - 2 Pgs.
01/24/06	DIS-4 (Letter to district court enclosing court order) issued. To:William McCool; c:Doss, D. Todd; c:Mickie, Stephan P., c:Snurkowski, Carolyn M.
01/24/06	Notice of Filing Certiorari: SC# 05-8794:
01/24/06	DC Order: IFP Denied; COA Denied; Appt. of Counsel Denied
01/24/06	CASE CLOSED

Entry Date	Docket Entry
01/24/06	ORDER: Execution of Sentence of Death is stayed pending further order of the undersigned or of the Court. Justice Anthony M. Kennedy
01/26/06	Motion to Proceed IFP:
02/06/06	Certiorari Granted - Case No. 05-8794:
02/10/06	Appellant's Motion to Proceed IFP is GRANTED. GBT(j)
02/10/06	MOT2 (Notice of court action) issued. c:Carolyn M. Snurkowski; c:D. Todd Doss; c:William McCool

U.S. District Court
Northern District of Florida - District Version
(Tallahassee)
CIVIL DOCKET FOR CASE #: 4:06-cv-00032-SPM

HILL v. CROSBY et al
Assigned to: JUDGE STEPHAN P MICKLE
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/20/2006
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
01/20/2006	1	DEATH WARRANT FOR CLARENCE HILL SIGNED BY GOVERNOR BUSH. EXECUTION SET FOR 1/24/06 AT 6:00 P.M. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	2	COMPLAINT (re DEATH WARRANT) against JAMES V CROSBY, JR, CHARLIE CRIST , filed by CLARENCE E HILL. (No filing fee paid, no IFP motion filed.) (Attachments: #1 Attachment A, #2 Attachment B, #3 Attachment C, #4 Appendix A)(cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	3	CIVIL COVER SHEET. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	4	DOCKET ANNOTATION BY COURT: Case forwarded to Florida Supreme Court via UPS on 1/5/2006. Box #1

Date Filed	#	Docket Text
		tracking # 1ZXX60800398946561, box #2 tracking #1ZXX60800399192570, box #31ZXX60800397735380. Miscellaneous Deadline - Clerk to monitor case for return of record to archive once closed by 3/6/2006. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	5	DOCKET ANNOTATION BY COURT: United States Court of Appeals, Eleventh Circuit notified of filing of complaint. Contact person at USCA Joyce Pope, to be notified of any and all orders or stays entered by this court immediately. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006		Set Deadlines: Miscellaneous Deadline - Clerk to monitor status of case by 1/23/2006. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Stephan P. Mickle notified that action is needed Re: 2 Complaint (re 1 Death Warrant). (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	6	*RESPONSE TO REQUEST FOR PERMANENT INJUNCTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION* ANSWER to Complaint by JAMES V CROSBY, JR.(SNURKOWSKI,

Date Filed	#	Docket Text
		CAROLYN) (Entered: 01/20/2006)
01/21/2006	7	ORDER Dismissing re 2 Complaint/Motion for Declaratory and Injunctive Relief filed by CLARENCE E HILL, for lack of jurisdiction. No stay of execution will issue in this case. Signed by Judge STEPHAN P MICKLE on 01/21/2006. (pao, Gainesville) (Entered: 01/21/2006)
01/23/2006	9	NOTICE *of Appeal of Order Dismissing Complaint for Declaratory and Injunctive Relief* by CLARENCE E HILL (DOSS, D) (Entered: 01/23/2006)
01/23/2006	10	MOTION to Appoint Counsel by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	11	MOTION for Leave to Appeal in forma pauperis by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	12	MOTION for Leave to Proceed in forma pauperis by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	13	FINANCIAL AFFIDAVIT by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Stephan P. Mickle notified that action is

Date Filed	#	Docket Text
		needed Re: 10 MOTION to Appoint Counsel, 11 MOTION for Leave to Appeal in forma pauperis, 12 MOTION for Leave to Proceed in forma pauperis, 13 Financial Affidavit (cda, Gainesville) (Entered: 01/23/2006)
01/23/2006	14	NOTICE OF APPEAL as to 7 Order by CLARENCE E HILL. (Clerk reposted to reflect correct event. Please see 9 NOTICE of Appeal of Order Dismissing Complaint for Declaratory and Injunctive Relief for PDF.) Certificate of Readiness due by 2/6/2006.(cda, Gainesville) Additional attachment(s) added on 1/24/2006 (cda, Gainesville). (Entered: 01/23/2006)
01/23/2006	15	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 14 Notice of Appeal. (cda, Gainesville) (Entered: 01/23/2006)
01/24/2006	16	ORDER denying 9 Certificate of Appealability, denying as moot 10 Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis; signed by Judge STEPHAN P MICKLE. (tss, Gainesville) (Entered: 01/24/2006)
01/24/2006	17	USDC LETTER Transmitting 16 ORDER denying 9 Certificate of Appealability, denying as moot 10

Date Filed	#	Docket Text
		Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis(cda, Gainesville) (Entered: 01/24/2006)
01/27/2006	18	ORDER of USCA as to 14 Notice of Appeal, filed by CLARENCE E HILL. Petitioner's motion for appointment of counsel pursuant to the Criminal Justice Act is GRANTED. (cda, Gainesville) (Entered: 01/27/2006)
01/27/2006	19	USCA ORDER IN LIEU OF MANDATE as to 14 Notice of Appeal, filed by CLARENCE E HILL. Appellant's application for stay of execution pending appeal is DENIED. (cda, Gainesville) (Entered: 01/27/2006)
02/02/2006	20	USCA Case Number 06-10621-P for 14 NOTICE OF APPEAL as to 7 Order by CLARENCE E HILL. (cda, Gainesville) (Entered: 02/03/2006)
02/02/2006	21	ACKNOWLEDGEMENT re 17 USDC LETTER Transmitting 16 ORDER denying 9 Certificate of Appealability, denying as moot 10 Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis. Received by USCA on 1/26/2006. USCA #06-10621-P. (cda, Gainesville) (Entered: 02/03/2006)

Date Filed	#	Docket Text
02/14/2006	22	USCA ORDER #06-10621-P granting appellant's motion for leave to proceed on appeal in forma pauperis. (atm, Gainesville) (Entered: 02/17/2006)

-- F.3d --, 2006 WL 163607 (C.A.11 (Fla.)),
19 Fla. L. Weekly Fed. C 203

United States Court of Appeals, Eleventh Circuit.

Clarence E. HILL, Plaintiff-Appellant,
v.
James V. CROSBY, Jr., Charlie Crist, Defendants-Appellees.
No. 06-10621.

Jan. 24, 2006.

Before EDMONDSON, Chief Judge, and TJOFLAT and PRYOR, Circuit Judges.

BY THE COURT:
Appellant Clarence Edward Hill has been convicted of capital murder in Florida and sentenced to death. His execution is scheduled for today, January 24, 2006, at 6:00 p.m. On January 20, 2006, he applied to this court for leave to file a second and successive habeas petition in an effort to forestall his execution. We denied his application in an order entered earlier today. At the same time, we denied his application under 28 U.S.C. §§ 1651 and 2251 for a stay of his execution.

Also on January 20, 2006, appellant brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983, in the United States District Court for the Northern District of Florida. He contends that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. He seeks a permanent injunction barring his execution. On January 21, 2006, the district court issued an order dismissing appellant's complaint on the ground that the complaint "is the 'functional equivalent' of a successive

habeas petition," and that the court lacked jurisdiction to entertain it in the absence of an order from the court of appeals granting appellant leave to file a successive petition.

The district court relied on as authority for its ruling our decision in *Robinson v. Crosby,* 358 F.3d 1281 (11th Cir. 2004), which, as the district court properly observed, dealt with "the very issue" appellant's complaint presents here. Appellant now appeals the district court's order, and he asks that we stay his execution pending our disposition of his appeal.

It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. *See* 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in *Robinson,* "such an application to file a successive petition would be due to be denied in any event. *See In re Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied,* 530 U.S. 1256, 120 S. Ct. 2710, 147 L. Ed. 2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

For this reason, we DENY appellant's application for a stay of his execution pending appeal.

SO ORDERED.

Slip Copy, 2006 WL 167585 (N.D. Fla.), 19 Fla. L. Weekly Fed. D 205

United States District Court, N.D. Florida.
Clarence HILL. Plaintiff,
v.
James CROSBY, Secretary of the Florida Department of Corrections, in his official capacity; and Charles Crist, Jr., Attorney General, in his official capacity, Defendants.
No. 4:06-CV-032-SPM.

Jan. 21, 2006.

D. Todd Doss, Hunt & Doss, Lake City, FL, for Plaintiff.
Carolyn M. Snurkowski, Attorney General State of Florida, Tallahassee, FL, for Defendants.

ORDER DISMISSING COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

MICKLE, J.

THIS CAUSE comes before the Court upon the "Verified Complaint for Declaratory & Injunctive Relief" (doc. 2) and all accompanying attachments and appendices filed by Plaintiff through counsel on January 20, 2006, and the response from the Attorney General (doc. 6) also filed January 21, 2006. For the following reasons, the Court finds that the motion must be dismissed for lack of jurisdiction.

This case has a long history dating back to Plaintiff's original death sentence in May of 1983. The procedural history is set out in the Florida Supreme Court's opinion of January 17, 2006, *Hill v. State*, 2006 WL 913[illegible] (Fla. Jan. 17, 2006),

demonstrating that Plaintiff has filed previous petitions for habeas corpus, both in the federal and state courts. *See, e.g., Hill v. Dugger,* 556 So. 2d 1385 (Fla. 1990); *Hill v. Moore,* 175 F.3d 915 (11th Cir. 1999); *Hill v. Butterworth,* 941 F. Supp. 1129 (N.D. Fla. 1996).

Plaintiff now brings the instant suit as a motion for declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged prospective violations of his right to be free from cruel and unusual punishment (doc. 2-1 at 2), claiming that death by lethal injection causes pain and unnecessary suffering. In support of his claim, Plaintiff points to "newly-discovered evidence" in the form of an article from the medical journal *The Lancet,* which purportedly found that inmates (in the cases studied by the researchers) had felt pain during their executions due to insufficient amounts of anesthetic in their bloodstream. Plaintiff seeks a permanent injunction barring the execution of his death sentence.

This very issue was dealt with by the Eleventh Circuit in *Robinson v. Crosby,* 358 F.3d 1281 (11th Cir. 2004). In *Robinson,* the appellant filed a § 1983 action in the Middle District of Florida alleging that "lethal injection causes those who are executed pain and suffering while they are paralyzed and unable to communicate." *Id.* at 1282. The district court dismissed the petition for lack of jurisdiction, holding that the appellant's § 1983 action was the functional equivalent of a successive habeas corpus petition, which would subject him to the authorization requirements of 28 U.S.C. § 2244. Absent the permission of the Eleventh Circuit, the appellant was not authorized to file a successive petition, and thus the district court lacked jurisdiction to consider it. *Id.* at 1283-84.

The Eleventh Circuit explicitly upheld the district court's finding:

> We conclude that the district court correctly dismissed Robinson's § 1983 complaint for lack of jurisdiction. A § 1983 claim seeking relief-including a TRO, preliminary injunction, or a stay of execution-from a sentence of death as cruel and unusual punishment is the "functional equivalent" of a successive habeas petition. The district court lacked jurisdiction to consider Robinson's claim because he failed to apply to this Court for permission to file a successive habeas petition. We further note that such an application to file a successive habeas petition would be due to be denied in any event. *See* In re *Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied,* 530 U.S. 1256, 120 S. Ct. 2710, 147 L. Ed. 2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).

Id. at 1284 (remaining internal citations omitted). Plaintiff's claim, like that of the appellant in *Robinson,* is virtually identical to those raised in other cases in which stays of execution have been denied. *Id.* at 1283 (*citing* In re *Roe,* 540 U.S. 1171 (2004); *Vickers v. Johnson,* 540 U.S. 1170, 124 S. Ct. 1196, 157 L. Ed. 2d 1224 (2004); *Zimmerman v. Johnson,* 540 U.S. 1087, 124 S. Ct. 979, 157 L. Ed. 2d 792 (2003); *and Beck v. Rowsey,* 540 U.S. 1098, 124 S. Ct. 980, 157 L. Ed. 2d 811 (2004) (Supreme Court vacated stay entered by district court)).

Plaintiff's claim of "newly-discovered evidence" is insufficient to overcome the procedural bar in this case. Plaintiff cites the *Lancet* article as conclusive proof that inmates do feel pain during the lethal injection procedure. He details the injection process, noting that sodium pentothal is

first administered as an anesthetic, followed by pancuronium bromide, a paralytic agent which prevents the inmate from moving or otherwise showing pain or discomfort. The final chemical to be injected is potassium chloride, which causes the actual death by stopping all movement of the heart and suffocating the inmate. The *Lancet* researchers found that toxicology reports in their case studies demonstrated that insufficient amounts of anesthetic were injected, permitting the inmates to experience the feelings of being suffocated and having a heart attack, yet remaining paralyzed by the pancuronium. While Florida's procedure was not examined in the study, Plaintiff argues that Florida's practice is "substantially similar" and thus poses the same risk to inmates.

These exact issues were raised and disposed of in *Robinson,* in which the Eleventh Circuit referred to affidavits filed in that case addressing "the effects of the drugs used during lethal injection, how they each cause pain and suffering, and particularly how the pancuronium bromide chemical paralyzes the person and masks the pain and suffering being incurred." *Id.* at 1285 n.4. An additional affidavit "discusse[d] how the level of potassium chloride being used in the lethal injection context may not cause actual cardiac arrest but may result in death by suffocation due to lack of oxygen." *Id.*

While the *Lancet* article itself may be new, having just been published last year, the factual basis of Plaintiff's claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states. Plaintiff has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence. *See* in re *Provenzano,*

215 F.3d 1233, 1236-37 (11th Cir. 2000).[1]

Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. *Robinson*, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's complaint/motion for declaratory and injunctive relief (doc. 2) is hereby *dismissed* for lack of jurisdiction. No stay of execution shall issue in this case.

DONE AND ORDERED.

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[1] The Supreme Court of Florida also noted in its opinion that

> [a]cross the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir.2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. § 1983 in part on The Lancet study at issue here); *Bieghler v. State*, 839 N.E.2d 691 (Ind. 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

2006 WL at *6.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CLARENCE EDWARD HILL, Plaintiff, v. JAMES V. CROSBY, SECRETARYOF THE FLORIDA DEPARTMENT CORRECTIONS, in his official capacity; CHARLES J. CRIST, JR., ATTORNEY GENERAL, in his official capacity, Defendants.	)	**This is a capital case.** **EXECUTION SCHEDULED FOR JANUARY 20, 2006 at 6:00 p.m.** CIVIL ACTION NO: 4:06-cv-00032-SPM **EXPEDITED HEARING REQUESTED**

VERIFIED COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

I.

Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of the right of Plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable and injunctive relief.

II.

Plaintiff

2. Clarence Hill is a United States citizen and a resident of the State of Florida. He is currently a death-sentenced inmate under the supervision of the Florida Department of Corrections. His DC Number is 089718. He is held in the Florida State Prison, Starke, Florida, 32091.

III.

Defendants

3. Defendant James V. Crosby is the Secretary of the Florida Department of Corrections. Defendant Charles J. Crist, Jr., is the Attorney General for the State of Florida.

IV.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 1651 (all-writs) 2201 (declaratory relief), 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

5. Venue in this Court is proper under 28 U.S.C. § 1391. This Court has personal jurisdiction over the defendants in this matter, because the defendants are located in the Northern District of Florida.

V.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy. The cruel irony is the issue is mooted

once the violation occurs and Mr. Hill is dead. Mr. Hill has exhausted his state and federal court remedies via appeals and habeas petitions. Mr. Hill currently has a petition for certiorari pending before the U.S. Supreme Court in his capital case and one of the issues is the constitutionality of Florida's lethal injection procedure[1]. See Attachment A. Therefore, Mr. Hill has exhausted all avenues of relief and turns to this Court for protection of his constitutional right to be free from cruel and unusual punishment.

VI.

Facts

7. Plaintiff Clarence Hill is scheduled for execution on January 24, 2006, at 6:00 p.m. Defendants plan to execute the Plaintiff by lethal injection using a succession of three chemicals: sodium pentothal, pancuronium bromide, and potassium chloride.

8. As set forth in greater detail in the declaration of anesthesiologist, Dr. David A. Lubarsky (Attachment B), the use of this succession of chemicals creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

9. Specifically, sodium pentothal, also known as thiopental, is an ultra-short acting substance which produces shallow anesthesia. (Att. B). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium

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[1] The procedural history of the appeals and habeas petitions filed by Mr. Hill are detailed in Attachment C and adopted as if expressly stated herein.

pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

10. The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Att. B). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Att. B).

11. The American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. (Att. C). Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness. (Att. C).

12. The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Att. B). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Att. B).

13. In a recent study published in 2005, Dr. David A. Lubarsky and three co-authors published in the world-renowned medical journal THE LANCET the results of their research on the effects of chemicals in lethal injections.[2] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., *Inadequate anaesthesia in lethal injection for execution*, Vol 365, THE LANCET 1412-14 (April 16, 2005)(Att. C).

14. The LANCET team found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Att. C). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

15. The chemical process utilized in executions in Florida is identical to that identified in the study:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide,

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[2] The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars. (Att. B).

> which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims v. State, 754 So. 2d 657, 666 (Fla. 2000).[3]

16. As stated by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Att. B).

VI.

Claim

17. Plaintiff incorporates paragraphs 1-15 by reference.

18. James V. Crosby, Secretary of the Florida Department of Corrections and Charles J. Crist, Jr., Attorney General, are acting under color of Florida law by using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

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[3] While Mr. Hill requested updated information from the defendants, such request was refused. Thus, at the present time, Mr. Hill can only assume that the Florida Department of Corrections has not changed this chemical process since the *Sims* opinion.

VII.

Prayer for Relief

19. Plaintiff requests that this Court issue a preliminary injunction, prohibiting defendants from executing Plaintiff until this Court has had the opportunity to fully consider this complaint without haste.

20. Plaintiff requests that this Court grant a permanent injunction, barring defendants from executing Plaintiff in the manner they currently intend.

21. Plaintiff requests that this Court grant reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as for costs of suit and any further relief that this Court deems just and proper.

This 20th day of January 2006.

Respectfully submitted,

/s/

D. Todd Doss
Florida Bar 0910384
725 S.E. Baya Drive, Suite 102
Lake City, FL 32025
Telephone No. 352-359-3972
Attorney for Plaintiff

VERIFICATION

State of Florida
County of Leon

I, D. Todd Doss, attorney for Plaintiff in the above-entitled action, being duly sworn, state that to the best of my knowledge and belief, the facts sets for in this Complaint are true and correct.

/s/
D. Todd Doss
Florida Bar 0910384
725 S.E. Baya Drive, Suite 102
Lake City, FL 32025
Telephone No. 352-359-3972
Attorney for Plaintiff

Subscribed to and sworn before me this 20th day of January 2006

/s/
Notary public, State of Florida
Commission expires:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CLARENCE EDWARD HILL,	)	
	)	
Petitioner,	)	
	)	CASE NO. 4:06cv32-SPM
	)	
JAMES V. CROSBY, JR., Secretary, Florida Dept. of Corrections, et al., in his official capacity,	)	
	)	
Respondent.	)	
	)	

RESPONSE TO REQUEST FOR PERMANENT INJUNCTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

COMES NOW Respondent, by and through undersigned counsel, and responds to Hill's request for permanent injunction included in his Verified Complaint for Declaratory and Injunctive Relief filed as an action pursuant to 42 U.S.C. § 1983, and motion to dismiss for failure to state a cause of action, and would show:

1. Clarence Edward Hill (DC No. 089718), is a Florida death-row inmate housed at Florida State Prison, Starke, Florida, sentenced to death for the 1982 first degree capital murder of Officer Stephen Taylor. **Florida Governor, Jeb Bush, signed a new death warrant on November 28, 2005,**

setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with Hill's execution set for Tuesday, January 24, 2006, at 6:00 P.M.

2. Hill seeks extraordinary review of this "expedited" action brought pursuant to 42 U.S.C. § 1983, asserting that he is entitled to permanent injunctive relief because defendants will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death".

3. As an initial point, Hill has not identified what administrative remedies he claims he has exhausted, albeit he protests he has exhausted "all avenues". *Nelson v. Campbell*, 541 U.S. 637, 643 (2004), clearly contends that Section 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *See* 42 U.S.C. § 1997e(a).

Moreover, the very language he uses to answer the "V. Exhaustion of Administrative Remedies", reflects that he is merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In fact, in his successive postconviction trek in state court he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" his arguments.

In this instance, Hill has **proven** the caveat set forth by the Court in *Nelson*, *supra* , that his claims are based on speculation and do not state a cause of action upon which relief may be granted:

> Finally, the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1) [18 USCS § 3626(a)(1)]; accord, § 3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a ' 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. § 1997e(a) [42 USCS § 1997e(a)] ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted**, or seeks monetary relief from a defendant who is immune from relief." § 1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. § 1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

4. Hill clearly seeks to circumvent federal habeas corpus review under 28 U.S.C. § 2244 by filing this action, the sole

purpose of which is to stop any execution. As observed in *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself--by simply altering its method of execution, the State can go forward with the sentence. *Cf. Weaver v. Graham*, 450 U.S. 24, 32-33, n.17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a**

State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure, personal to him,[1] is unnecessary to complete his execution. Rather Hill points to a recent research paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris et al., supra. at 1413. The study ultimately concludes that 'public review of lethal injection is warranted.' *Id.* at 1414." *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review

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[1] In *Nelson*, 541 U. S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); id., at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement). No Alabama statute requires use of the cut-down, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

> **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."**

Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412, 1414 (2005) (Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. § 1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, *Brown v. Crawford*, 408 F.3d 1027 (8th Cir. May 17, 2005), *cert. denied Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the issue in *Brown*, "challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[2]

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[2] The dissent also succinctly reports what the specific issue was in *Brown*,

> "Brown's § 1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., Inadequate anaesthesia in lethal injection for execution, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in

5. Hill raised, as part of his December 15, 2005 successive state court postconviction litigation, the issue of whether "new evidence" has come to light based on "research letters" published in THE LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made herein in this action. *See Hill v State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006):

> Hill's claim is that a research letter published in April 2005 in *The Lancet* presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 *Lancet* 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.
>
> In *Sims*, we held that "the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. This 2005 study, as found by the trial court, does not sufficiently call into question our holding in *Sims*.

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twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

This study applies toxicology data in autopsy reports obtained from Arizona, Georgia, North Carolina, and South Carolina to the protocols used by Texas and Virginia. n2 No toxicology data from Florida was used. Indeed, the study recognizes that the two grams of sodium pentothal administered during lethal injection in Florida is "a relatively large quantity [when] compared with the typical clinical induction dose of 3-5 mg/kg." Koniaris et al., supra, at 1412. n3 Nonetheless, from the autopsy data obtained in these other states, the study hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. See Koniaris et al., supra, at 1413. The study ultimately concludes that "public review of lethal injections is warranted." *Id.* at 1414.

n2 The study relies on the autopsy toxicology results obtained from these four states because, according to the authors, they could not obtain this data from Texas or Virginia. Koniaris et al., supra at 1412-13. There is no allegation that either the protocol or autopsy data from Florida was not available to the authors.

n3 In *Sims*, we detailed the procedure for carrying out lethal injection in Florida. 754 So. 2d at 665 n.17. This included a requirement that inmates be injected with "'no less than' two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious." Id. The defense expert agreed that this amount of sodium pentothal was a "lethal dose and certain to cause rapid loss of consciousness." *Id.* at 666 n.17.

This study does not justify an evidentiary hearing in this case. Fla. R. Crim. P. 3.852(i); *see also* Fla. R.

Crim. P. 3.851(f)(5)(A). Under Florida Rule of Criminal Procedure 3.851(f)(5)(B), a trial court may deny a request for an evidentiary hearing when "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Id. at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing. n5

n4 In Sims, we recognized that Florida's procedures address some of the reasons given in the study for finding that two grams of anesthesia "may be overly simplistic." The study attributes its results, in part, to the lack of medical training in the personnel and the inmate's high level of anxiety immediately before the execution. Koniaris et al., supra, at 1412. In Florida, both a doctor and a physician's assistant are present during the execution, and the inmate is provided with a Valium before the execution "if necessary to calm anxiety." *Sims*, 754 So. 2d 657.

> n5 Across the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir. 2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. '1983 in part on *The Lancet* study at issue here); *Bieghler v. State*, No. 2005 Ind. LEXIS 1156, 34S00-0511-SD-679, 2005 WL 3549175 (Ind. Dec. 28, 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

See also recent rejections of identical claims by the United States Supreme Court in other case under warrant challenging claims as found in *Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and *Donald Jones v. Purkett*, 04A-912 (April 26, 2004); *Hicks v. Taft*, 05A-487 (November 29, 2005); *Johnston v. Roper*, 05A-206 (August 30, 2005).

7. Terminally, as observed by the Court in Nelson, 541 U.S. at 649-50:

> Moreover, as our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) (*per curiam*), makes clear, the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute § 1983 action challenging the constitutionality of California's use of

the gas chamber. We left open the question whether the inmate's claim was cognizable under § 1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 654, 118 L. Ed. 2d 293, 112 S. Ct. 1652.

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see Blodgett*, 502 U.S., at 239, 116 L. Ed. 2d 669, 112 S. Ct. 674; *McCleskey*, 499 U.S., at 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

See also *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (equitable relief not warranted where delay in bringing action

challenging method of execution post-*Nelson*); *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005) (same).

In the instant case Hill's "action" should be dismissed and, even assuming *arguendo*,that he has somehow met the *Nelson, supra*, test setting forth an independent '1983 action, no stay can obtain.

CONCLUSION

Based on the foregoing, all requested relief should be denied in all respects.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

/s/ Carolyn M. Snurkowski
CAROLYN M. SNURKOWSKI
Asst. Deputy Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 06-10621-P

CLARENCE EDWARD HILL,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JAMES V. CROSBY,	)	
SECRETARY OF THE	)	EMERGENCY
FLORIDA DEPARTMENT OF	)	APPLICATION:
CORRECTIONS, in his	)	CAPITAL CASE,
official capacity;	)	DEATH WARRANT
and	)	SIGNED;
	)	EXECUTION
CHARLES J. CRIST, JR.,	)	IMMINENT
ATTORNEY GENERAL, in his	)	
official capacity	)	
	)	
Appellees.	)	
	)	

APPLICATION FOR A STAY OF EXECUTION AND FOR EXPEDITED APPEAL

COMES now the Appellant, CLARENCE HILL, through undersigned counsel and respectfully moves for a stay of execution and an expedited appeal. Mr. Hill's execution is presently scheduled for January 24, 2006 at 6:00 p.m.

I. PROCEDURAL HISTORY

Appellant, Clarence Hill, was convicted of first degree murder in 1983. On appeal, his conviction was affirmed, but his sentence was vacated. Following a second sentencing proceeding, Mr. Hill was again sentenced to death, and the Florida Supreme Court affirmed. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied, Hill v. State,* 108 S. Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990.

Mr. Hill filed an expedited postconviction motion, which was denied on January 18, 1990. On appeal, the Florida Supreme Court denied relief. *Hill v. State*, 556 So. 2d 1385 (Fla. 1990).

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. After granting a stay of execution, on August 31, 1992, the district court granted relief to Mr. Hill on a sentencing issue.

On remand, the Florida Supreme Court again denied relief. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995). Mr. Hill's subsequent state and federal applications, including his federal Petition for Writ of Habeas Corpus, were unsuccessful. *See Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *Hill v. State*, 528 U.S. 1087 (2000), *Hill v. State*, 2006 Fla. LEXIS 8 (January 17, 2006). On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States

Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction. Thereafter, on Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal.

II. BASIS FOR STAY OF EXECUTION

This Court utilizes a four part test in determining whether a stay of execution should be granted:

> whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F. 2d 1410, 1421 (11th Cir. 1987). Mr. Hill has met the standards attendant to the granting of a stay of his execution. Each of the criteria is satisfied in this case:

A. IRREPARABLE INJURY

If no stay of execution is granted, Mr. Hill will be executed by lethal injection at the Florida State Prison on Tuesday, January 24, 2006, at 6:00 p.m. This constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice, granting a stay of execution and noting the "obviously irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty" constitutes irreparable injury and weighs heavily in favor of granting a stay).

B. HARM TO OTHER PARTIES

There will be no harm to other parties if a stay of execution is granted. Mr. Hill will remain in the custody of the State in Florida State Prison, where he has been held

since his conviction. A relatively brief continuation of the *status quo* will cause absolutely no harm to other parties.

C. PUBLIC INTEREST

Although there are competing public interests, ultimately one factor favors the issuance of the temporary relief sought. Certainly, the public has an interest in having the execution of Mr. Hill pursuant to the judgment of the Florida Courts. More importantly, however, it has an interest in having no execution take place until it is determined that Mr. Hill's execution will be carried out consistent the with requirements of the Eighth Amendment. The temporary delay in carrying out the execution, which will be necessitated by review and consideration of the merits of Mr. Hill's case, is a small price to pay to assure fairness in this critical aspect of carrying out Mr. Hill's sentence.

D. THE LIKELIHOOD THAT MR. HILL WILL PREVAIL ON THE MERITS

The likelihood that Mr. Hill will prevail on the merits of his claims is demonstrated by the fact that there is now empirical, scientific evidence establishing that the chemical process for lethal injection utilized in accordance with the Florida Department of Correction's protocol, creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors detailed the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., *Inadequate anaesthesia in lethal injection for execution*, Vol 365, THE

LANCET 1412-14 (April 16, 2005).[1] This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[2] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.[3]

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause

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[1] Mr Hill has not delayed unnecessarily in bringing his Complaint. This study was published in 2005 and to Mr. Hill's knowledge, it constitutes the first empirical research published regarding lethal injection, thus making it unique.

[2] Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Complaint, Att. A).

[3] As noted in Mr. Hill's 1983 action, the chemical process utilized in executions in Florida is identical to that identified in the study.

pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A).

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Complaint, Att. A).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will

not be anesthetized at the time of his death. (Complaint, Att. A).

Here, the appellees are acting under color of Florida law by using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits the risk of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," *Id.* at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. *Id.* at 370 (emphasis added).

Under the present circumstances, given the fact that Mr. Hill possesses scientific evidence proving his claim, he will likely succeed on the merits of the issue; that is, he will be unnecessarily subjected to a substantial risk of wanton infliction of pain, in violation of the Eighth Amendment.

III. MR. HILL'S CHALLENGE TO THE CHEMICALS TO BE UTILIZED IN HIS EXECUTION WAS PROPERLY BROUGHT IN A § 1983 ACTION

In dismissing Mr. Hill's complaint for lack of jurisdiction, the district court stated:

> Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. *Robinson*, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Order at 5.

Mr. Hill recognizes that this Court, in *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), concluded "that the district court correctly dismissed Robinson's *§ 1983* complaint for lack of jurisdiction" as a challenge to lethal injection because it is the "'functional equivalent' of a successive habeas petition." However, Mr. Hill asserts that in light of the United States Supreme Court case in *Nelson v. Campbell*, 541 U.S. 637 (2004), which was subsequent to this Court's opinion in *Robinson*, the district court's order was erroneous.

In *Nelson*, the United States Supreme Court stated:

> We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution — *e.g.*, lethal injection or electrocution — fall within the core of federal

habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver* v. *Graham*, 450 U.S. 24, 32-33, n.17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See *Calderon* v. *Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238 (1992) *(per curiam); McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Nelson, 541 U.S. at 643-4 (emphasis added).

The Court concluded that it "need not reach here the difficult question of how to categorize method-of-execution claims generally." *Id.* at 644. Rather, in the specific case of a cut-down procedure, the Court stated:

> Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an execution, is indeed a valid conditions of confinement claim"); see also *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644-5.

Subsequent to *Nelson*, the Fourth Circuit Court of Appeals determined that where the Petitioner does not assert that lethal injection generally is an unconstitutional method of execution, but rather that the particular protocol the State plans to use is impermissible, this constitutes a cognizable claim under § 1983. *Reid v. Johnson*, 2004 U.S. App. LEXIS 15855, *6 (2004), stay vacated by *Johnson v. Reid*, 2004 U.S. LEXIS 4856 (2004) ("In light of *Nelson*, we conclude that Reid has stated a cognizable claim under *§ 1983*. Like Nelson, Reid does not assert that lethal injection generally is

an unconstitutional method of execution. Rather, he asserts only that the particular protocol the State plans to use is impermissible; he acknowledges that other protocols would pass constitutional muster.").[4]

As in *Nelson*, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution.[5] Rather, he is "seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the 'fact' or 'validity' of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 693-4. Here, it is the succession of chemicals to be utilized, in accordance with the Department of Correction's protocol, which creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. As such, Mr. Hill's claim is a cognizable one under § 1983.

IV. CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests that this Court grant his Application For a Stay of Execution and for Expedited Appeal.

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[4] There appears to be some distinctions in the rulings of the various circuits as to this issue. For example, the Ninth Circuit Court of Appeals has determined that a § 1983 action is a proper vehicle by which to challenge a method of execution. *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir. 2005). Meanwhile, the Fifth Circuit Court of Appeals has yet to determine whether a challenge to a particular protocol properly states a claim under *§ 1983*, instead disposing of such claims on other grounds. See, e.g., *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004).

[5] "[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Nelson*, 541 U.S. at 693-4.

Respectfully submitted,

/s/
D. TODD DOSS
Florida Bar No. 0910384
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025-6092
Telephone (386) 755-9119
Facsimile (386) 755-3181

COUNSEL FOR APPELLANT

No. 06-10621-P
(Capital Case-Active Warrant-Execution Set For January 24, 2006, at 6:00 P.M.)

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CLARENCE EDWARD HILL,
Appellant,

vs.

JAMES V. CROSBY, JR., Secretary
Florida Department of Corrections, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida
The Honorable Stephan P, Mickle, District Court Judge

BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

Florida Attorney General's Office
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3566

Attorneys for Appellee

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE STATEMENT

Following, pursuant to Rule 26.1 of the Eleventh Circuit Rules of Appellate Procedure, are those parties and individuals interested for purposes of this appeal:

D. Todd Doss	Counsel for Petitioner/Appellant
Charles J. Crist, Jr.	Florida Attorney General
James V. Crosby, Jr.	Secretary, Florida Department of Corrections
Carolyn M. Snurkowski	Assistant Deputy Attorney General, Counsel for Appellee
Stephan P. Mickle	U.S. District Court Judge, Northern District of FL
Clarence Edward Hill	Appellant

Family of the deceased murder victim, Officer Stephen Taylor

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This appeal follows the order of the United States District Court, Northern District, dated January 21, 2006, dismissing Hill's action brought pursuant to 42 U.S.C. § 1983. No oral argument is necessary to resolve the sole issue presented as to the validity of Florida's method of execution--lethal injection.

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STATEMENT OF JURISDICTION

Appellant, a state prisoner under a sentence of death, filed his "Petition Under 42 U.S.C. § 1983 on January 20, 2006. The Appellee responded that same day and on January 21, 2006, the district court dismissed the action in an Order Dismissing Complaint For Declaratory and Injunctive Relief and denied any stay.

Hill filed his notice of appeal on January 23, 2006.

STATEMENT OF THE ISSUE

I. Whether the District Court erred in dismissing Hill's 42 U.S.C. § 1983, Action.

STATEMENT OF THE CASE

A. Warrant

Clarence Edward Hill (DC No. 089718),is a Florida death-row inmate housed at Florida State Prison, Starke, Florida, sentenced to death for the 1982 first-degree capital murder of Officer Stephen Taylor. **Florida Governor, Jeb Bush, signed a new death warrant on November 28, 2005, setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with Hill's execution set for Tuesday, January 24, 2006, at 6:00 P.M.**

B. Facts

On October 19, 1982, Clarence Hill and his accomplice, Cliff Jackson, stole a pistol and an automobile in Mobile, Alabama, which they later used to rob a savings and loan association in Pensacola. During the robbery, the police arrived, and Hill and Jackson fled the savings and loan building from different exits. The police immediately apprehended Jackson, who had exited through the front door. Hill, who had fled out the back door, approached two officers from behind as they attempted to handcuff Jackson. Hill shot the officers, killing one and wounding the other. Hill was convicted of first-degree murder, attempted first-degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. The trial court sentenced Hill to death for the first-degree murder conviction and to consecutive life sentences for the attempted murder and robbery convictions. On appeal, the Florida Supreme Court affirmed all of Hill's convictions and sentences with the exception of the death sentence. The Court remanded the cause for a new sentencing hearing before a new jury because of error in the jury selection process. *Hill v. State*, 477 So. 2d 553 (Fla. 1985).

In the resentencing proceeding, a second jury recommended the death sentence by an eleven-to-one vote. The trial court reimposed the death sentence, finding five aggravating circumstances and one mitigating circumstance. The Florida Supreme Court affirmed the resentence, finding that four of the five aggravating circumstances were proven beyond a reasonable doubt and concluding that consideration of the erroneous aggravating circumstance, that the murder was committed in a cold, calculated, and premeditated manner, could not possibly have compromised the weighing process of either the jury or the judge. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 99 L. Ed. 2d 512, 108 S. Ct. 1302 (1988).

C. Litigation As To Lethal Injection

On December 15, 2005, Hill filed the latest postconviction litigation in the trial court, raising six (6) claims. On December 23, 2005, the state trial court denied all relief. The Court found **Claims I (Lethal Injection)**, II (Mental Retardation), III (Mental Age per *Roper v. Simmons*), V (Shackling), and VI (Reconsideration of prior 3.850), procedurally barred; and Claim IV (Public Records) Hill's state request for records was satisfied or no colorable basis for postconviction relief was presented, based on the additional public records request outside Rule 3.852(h), Fla.R.Crim.P.

Rehearing was filed on December 30, 2005, and denied on January 3, 2006, by the trial court. Briefing occurred on January 3, 2006, oral argument was held January 11, 2006, and all relief was denied January 17, 2006, when the Florida Supreme Court found that Hill's claims were either procedurally barred or failed to raise a claim upon which relief was warranted. *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Hill filed a petition for writ of certiorari in the United States Supreme Court arguing that the Florida

courts were incorrect in their **conclusions as to the lethal injection issue** and the mental age under *Roper* issue.

The Florida Supreme Court held, in *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. January 17, 2006), that:

> Hill's claim is that a research letter published in April 2005 in *The Lancet* presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.
>
> In *Sims*, we held that "the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. This 2005 study, as found by the trial court, does not sufficiently call into question our holding in *Sims*. This study applies toxicology data in autopsy reports obtained from Arizona, Georgia, North Carolina, and South Carolina to the protocols used by Texas and Virginia. n2 No toxicology data from Florida was used. Indeed, the study recognizes that the two grams of sodium pentothal administered during lethal injection in Florida is "a relatively large quantity [when] compared with the typical clinical induction dose of 3-5 mg/kg." Koniaris, et al., *supra*, at 1412.

n3 Nonetheless, from the autopsy data obtained in these other states, the study hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris, et al., *supra*, at 1413. The study ultimately concludes that "public review of lethal injections is warranted." *Id.* at 1414.

> n2 The study relies on the autopsy toxicology results obtained from these four states because, according to the authors, they could not obtain this data from Texas or Virginia. Koniaris, et al., *supra* at 1412-13. There is no allegation that either the protocol or autopsy data from Florida was not available to the authors.
>
> n3 In *Sims*, we detailed the procedure for carrying out lethal injection in Florida. 754 So. 2d at 665 n.17. This included a requirement that inmates be injected with "'no less than' two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious." *Id.* The defense expert agreed that this amount of sodium pentothal was a "lethal dose and certain to cause rapid loss of consciousness." *Id.* at 666 n.17.

This study does not justify an evidentiary hearing in this case. Fla. R. Crim. P. 3.852(i); *see also* Fla. R. Crim. P. 3.851(f)(5)(A). Under Florida Rule of Criminal Procedure 3.851(f)(5)(B), a trial court may deny a request for an evidentiary hearing when "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The trial court in this case correctly determined that this

study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id.* at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing. n5

n4 In *Sims*, we recognized that Florida's procedures address some of the reasons given in the study for finding that two grams of anesthesia "may be overly simplistic." The study attributes its results, in part, to the lack of medical training in the personnel and the inmate's high level of anxiety immediately before the execution. Koniaris, et al., *supra*, at 1412. In Florida, both a doctor and a physician's assistant are present during the execution, and the inmate is provided with a Valium before the execution "if necessary to calm anxiety." *Sims*, 754 So. 2d 657.

n5 Across the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir. 2005) (dismissing an

appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. § 1983 in part on *The Lancet* study at issue here); *Bieghler v. State*, No. 2005 Ind. LEXIS 1156, 34S00-0511-SD-679, 2005 WL 3549175 (Ind. Dec. 28, 2005) (finding *The Lancet* study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

D. Standard of Review

This Court's standard for review is de novo.

SUMMARY OF THE ARGUMENT

Hill's 42 U.S.C. §1983, action was properly dismissed by the federal district court because "Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus." Indeed, the instant attack on the method of execution is based on the "identical evidence" that he sought postconviction relief in the trial and appellate courts of Florida.

ARGUMENT

I. The District Court did not err in dismissing Hill's 42 U.S.C. § 1983, Action.

Hill seeks extraordinary appellate review of the denial of this "expedited" action brought pursuant to 42 U.S.C. § 1983, in the federal district court asserting that he is entitled to further relief because Appellee will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death" on or about January 24, 2006.

Procedurally, Hill has not identified what administrative remedies he claims he has exhausted, albeit he protested below that he exhausted "all avenues". The United States

Supreme Court, in *Nelson v. Campbell*, 541 U.S. 637, 643 (2004), contemplated that § 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *See* 42 U.S.C. § 1997e(a).[1]

Hill has **proven** the "caveat" set forth by the Court in *Nelson*, *supra.*, that claims based on speculation **do not** state a cause of action upon which relief may be granted:

> Finally, the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1) [18 USCS § 3626(a)(1)]; accord, § 3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. § 1997e(a) [42 USCS § 1997e(a)] ("No action shall be brought

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[1] The very language Hill used to answer the "V. Exhaustion of Administrative Remedies" below, reflects he was merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In Hill's successive postconviction, state court litigation, he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" this argument.

> with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted**, or seeks monetary relief from a defendant who is immune from relief." § 1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. § 1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

Hill clearly sought to circumvent federal habeas corpus review under 28 U.S.C. § 2244 by filing his §1983 action, the sole purpose of which was to stop any execution. As observed in *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (Emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself-by simply altering its method of execution, the State can go forward with the sentence. *Cf. Weaver v. Graham*, 450 U.S. 24, 32-33, n. 17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, *see* Ala. Code**

§ 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure personal to him,[2] is unnecessary to

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[2] In *Nelson*, 541 U.S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); *id.*, at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement).

complete his execution. Rather Hill points to a recent research paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris, et al., *supra.* at 1413. The study ultimately concludes that ' public review of lethal injection is warranted.' *Id.* at 1414." *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain**. **Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."**

Leonidas G. Koniaris, et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412, 1414 (2005) (Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. § 1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, *Brown v. Crawford*, 408 F.3d 1027 (8th Cir. May 17, 2005), *cert. denied Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the issue in *Brown*,

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No Alabama statute requires use of the cut-down, *see* Ala. Code § 15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

"challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[3] Hill raised as part of his December 15, 2005 successive state court postconviction litigation the issue of whether "new evidence" has come to light based on "research letters" published in THE LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made in his §1983 pleading below. *See Hill v State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006), citing *Sims*, "The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in

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[3] The dissent also succinctly reports what the specific issue was in *Brown*,

> "Brown's § 1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., *Inadequate anaesthesia in lethal injection for execution*, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id.* at 668." (Footnote omitted).

See also recent rejection of this identical claim by the United States Supreme Court in other case under warrant challenging lethal injection--*Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and *Donald Jones v. Purkett*, 04A-912, (April 26, 2004); *Hicks v. Taft*, 05A-487 (November 29, 2005); *Johnston v. Roper*, 05A-206 (August 30, 2005).

Moreover in two post-*Nelson*, cases from the Fifth Circuit, *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) and White v. Johnson, 429 F.3d 572 (5th Cir. 2005), the court held:

> The district court *sua sponte* dismissed White's action for equitable relief because it determined that, just like the plaintiff in *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004), White waited too long to bring his §1983 claim. We review the district court's *sua sponte* dismissal de novo. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998).
>
> "Method of execution actions may be brought in a §1983 suit instead of a habeas petition," but the §1983 claim should "not unduly threaten the State's ability to carry out the scheduled execution." *Harris*, 376 F.3d at 416 (citing *Nelson v. Campbell*, 541 U.S. 637, 643-48, 124 S. Ct. 2117, 2123-25, 158 L. Ed. 2d 924 (2004)). Additionally, the fact that "an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right," and "[a] court may consider the last-minute nature of an application

to stay execution in deciding whether to grant equitable relief." *Nelson*, 541 U.S. at 649, 124 S. Ct. at 2125-26 (citing *Gomez v. United States Dist. Court*, 503 U.S. 653, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) (*per curiam*)). White argues that because he is not requesting a stay, the Supreme Court's pronouncements in *Nelson* should not apply. These rules, however, were declared by the Court in the context of last-minute § 1983 method of execution challenges as well as last-minute stay requests. *Id.* The principles enunciated by the Court are equally applicable to all types of equitable relief, including permanent injunctions, sought by inmates facing imminent execution.

When weighing equitable remedies, a court "must take into consideration the State's strong interest in proceeding with its judgment and . . . attempts at manipulation." *Id.* Further, "given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against" last-minute equitable remedy requests. *See id.* at 650, 124 S. Ct. at 2126. This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies. *See id.*

As in *Harris*, "we do not decide whether [White] properly states a claim under §1983, because even if he does, he is not entitled to the equitable relief he seeks" due to his dilatory filing. 376 F.3d at 417 (citing *Gomez*, 503 U.S. at 654, 112 S. Ct. 1652). White has been on death row for more than six years, and only now, with his execution imminent, has decided to challenge a procedure for lethal injection

that the State has been using for his entire stay on death row. *See Harris*, 376 F.3d at 417. Like Harris, White has no excuse for delaying his claim until the eleventh hour, and he cannot argue that "he was unaware of the State's intention to execute him by injecting the three chemicals he now challenges." *Id.* n1

> n1 Additional hurdles face White's complaint that, because the State might use a cut-down procedure to gain venous access, he will be subject to an Eighth Amendment violation. First, it is counter-factual, as the State denies it will resort to this procedure, and White concedes that IV access has been achieved in his hands several times. Second, this claim is barred from federal review by White's failure to exhaust it pursuant to the PLRA. *See, Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998).

White, 429 F.3d at 573-74. *See also Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (In the present case, Aldrich's §1983 action challenges the constitutionality of the protocol that Texas will use to execute him, but he does not allege that there is any specific acceptable alternative method that the state could use, or that the proposed protocol is wholly unnecessary to the execution. Thus, contrary to the situation in *Nelson*, Aldrich's § 1983 claim challenging the constitutionality of that protocol and stay of its usage will effectively prevent the state from carrying out his execution. *Nelson's* holding clearly requires that a capital defendant, in order to assert a § 1983 method-of-execution claim, must allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution. n11 Because Aldrich did not

allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his § 1983 action.); *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005).

Terminally, as observed by the Supreme Court in *Nelson*, 541 U.S. at 649-50:

> Moreover, as our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) (*per curiam*), makes clear, the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute §1983 action challenging the constitutionality of California's use of the gas chamber. We left open the question whether the inmate's claim was cognizable under §1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 654, 118 L. Ed. 2d 293, 112 S. Ct. 1652.

> A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see Blodgett*, 502 U.S., at 239, 116 L. Ed. 2d 669, 112 S. Ct. 674; *McCleskey*, 499 U.S., at 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

In the instant case Hill's "action" should be dismissed. And even assuming *arguendo*, that he has somehow met the *Nelson, supra.* test setting forth an independent §1983 action, no stay or relief should be obtained.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should deny all appellate review.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General

/s/
CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext 4566
FAX (850) 487-0997

Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, Appellee's Statement of Appellate Jurisdiction was produced using WordPerfect 9.0, in Times New Roman, font 14, and contains 4,508 words.

/s/
CAROLYN M. SNURKOWSKI

CERTIFICATE OF SERVICE

I hereby certify that one (1) true and correct copy of the foregoing was furnished via Email and mailed, postage prepaid to D. Todd Doss, 725 SE Baya Drive, Suite 102, Lake City, Florida 32025, on this 23rd day of January, 2006

/s/
CAROLYN M. SNURKOWSKI